93

3

FILED
MAY 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-931

IN THE
Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC., *et al.*,

Petitioners,

v.

DEVON LOUISIANA CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ANTHONY J. STAINES
Counsel of Record
STEPHEN E. MATTESKY
STAINES & EPPLING
3500 N. Causeway Blvd., Ste. 820
Metairie, LA 70002
(504) 838-0019

Counsel for Respondents

215937

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Devon Louisiana Corporation is a wholly owned subsidiary of Devon Energy Corporation, Inc., a publicly held corporation.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Summary of the Argument	1
Statement of the Case	1
Reasons for Denying the Petition	5
1. The Fifth Circuit correctly applied the proper standard in determining whether the contract is maritime or not.	5
II. The Second and Ninth Circuit's Reevaluation of their Prior Jurisprudence in Light of this Court's Decision in *Kirby* does not Constitute a Split among Circuits.	9
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Campbell v. Soniat Offshore Drilling, Inc.,
979 F.2d 1115 (5th Cir. 1992) 8

Davis & Sons, Inc. v. Gulf Oil Corp.,
919 F.2d 313 (5th Cir. 1990) ..... *passim*

Demette v. Falcon Drilling Co., Inc.,
280 F.3d 492 (5th Cir. 2002) 8

Diamond Offshore Co. v. A&B Builders, Inc.,
302 F.3d 351 (5th Cir. 2002) 8

Dupre v. Penrod Drilling Corp.,
993 F.2d 474 (5th Cir. 1993) 8

Exxon Corp. v. Central Gulf Lines,
500 U.S. 603 (1991) 10

Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.,
413 F.3d 307 (2d Cir. 2005) 10

Hoda v. Rowen Cos., Inc.,
419 F.3d 379 (5th Cir. 2005) 7, 8

Hollier v. Union Tex. Petroleum Corp.,
972 F.2d 662 (5th Cir. 1992) 8

Cited Authorities

Page

Kossick v. United Fruit Co.,
365 U.S. 731 (1961) ..... *passim*

Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.,
543 U.S. 14 (2004) ..... *passim*

N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Corp., 249 U.S. 119 (1919) .. 8

Sentry Select Ins. Co. v. Royal Ins. Co. of Am.,
481 F.3d 1308 (9th Cir. 2007) 10, 11

Smith v. Penrod Drilling Corp.,
960 F.2d 456 (5th Cir. 1992) 8

Thibodeaux v. Vamos,
487 F.3d 288 (5th Cir. 2007) 8

Statutes:

LA. REV. STAT. ANN. § 9:2780 4

SUMMARY OF THE ARGUMENT

The Fifth Circuit's opinion affirming the District Court's application of the two-step *Davis* methodology for determining whether a contract is maritime or non-maritime is consistent with this Court's holdings in *Kossick v. United Fruit Co.* and *Norfolk So. Rwy. Co. v. James N. Kirby*, Pty Ltd. and Petitioners have offered no compelling reasons for this Court to grant the Petition.

STATEMENT OF THE CASE

This case presents the question when is a contract deemed "maritime" such that federal maritime law controls its interpretation. This issue arises when contracts contain both maritime and non-maritime elements. Petitioners claim that the Fifth Circuit's two-step test for determining whether the nature and character of a contract for services associated with offshore oil and gas production is maritime as set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990) is inconsistent with this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), addressing a contract for intermodal transportation of goods.

The suit arises out of an injury to an oil field worker, Harry Thomas. Mr. Thomas was employed by Magnolia Industrial Fabricators, Inc. ("Magnolia") to provide services to Devon Louisiana Corp.'s ("Devon") offshore activities. Magnolia had entered into a Master Service Agreement with Devon. A Master Service Agreement ("MSA") is a contract between an oil company and a

service contractor that sets forth the terms and conditions under which work will be done if and when the oil company needs a service contractor's services. Devon's MSA with Magnolia serves as a blanket agreement and calls for no specific work, but contemplates that from time to time Devon will initiate a work order requesting that Magnolia perform certain work or furnish certain services.

The MSA between Devon and Magnolia contains provisions for the use of vessels, requirements for marine insurance coverage including maritime liability, hull and machinery, and protection and indemnity. It contains requirements that Magnolia comply with all applicable federal safety regulations, including those of the United States Coast Guard, and contains provisions for removal of wreck and debris above or below the surface of the water. The agreement also contains a provision that requires Magnolia to indemnify Devon if one of Magnolia's employees is injured and sues Devon, and requires Magnolia to have Devon named as an additional assured on the liability policy issued by St. Paul Surplus Lines ("St. Paul").

The MSA includes a choice of law clause that states "This Contract shall be governed by the General Maritime Laws of the United States." The inclusion of this language in the MSA clearly indicates that the parties intended and expected that maritime law would apply in recognition that services that Magnolia would perform for Devon would involve maritime activities and transactions.

Pursuant to the MSA between Devon and Magnolia, a Magnolia crew was dispatched to perform various maintenance and repairs to one of Devon's offshore platforms located off the coast of Louisiana in navigable waters of the United States. A vessel was needed to support the repair crew, transport the crew, their equipment, materials, and supplies to the offshore location. The vessel was also utilized to feed and lodge the Magnolia crew and served as a work platform. More particularly, the vessel's aft deck served as a work site for fabrication work, and all the welding and cutting operations performed by the Magnolia crew.

While the vessel was moored to the platform, Thomas and other Magnolia employees worked from the aft deck of the vessel rigging equipment and supplies, fabricating parts and performing welding and cutting procedures aboard the vessel. Other Magnolia employees were assigned to work aboard the offshore platform. Contrary to statements made by the Petitioners, Mr. Thomas performed all of his work aboard the vessel. The work of Thomas, as well as the work of other Magnolia employees directly contributed to the function of the vessel as a mobile work platform and staging area and as a means of marine transportation.

While handling cargo aboard the vessel, Thomas was injured when a wave propelled him into some welding equipment. Thomas sued Devon and other parties. Devon in turn bought a Third Party Complaint against Magnolia and St. Paul pursuant to the indemnity and insurance clauses in the MSA which obligated Magnolia to indemnify Devon and required St. Paul to provide Devon insurance coverage.

Magnolia and St. Paul separately moved for summary judgment seeking dismissal of Devon's claims for defense, indemnity and insurance coverage arguing that Louisiana law governs the contract and that the indemnity insurance obligations are unenforceable under the Louisiana Oil Field Indemnity Act. La. Rev. Stat. Ann. § 9:2780(b) (2005). Devon filed responses and filed Cross Motions for Summary Judgment arguing that the indemnity and insurance provisions were enforceable under maritime law.

Both the District Court and the Fifth Circuit, after careful analysis of the nature and character of the MSA and work order[1] read together, concluded that the contract between Devon and Magnolia was a maritime contract governed by maritime law and that the indemnity and insurance clauses contained within the contract were valid and enforceable. In reaching this conclusion, both courts relied on the two-step test for determining whether a contract is maritime or non-maritime, as originally set forth by this Court in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) and as applied to contracts for services associated with offshore oil and gas production as set forth in the Fifth Circuit decision in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990).

---

1. There was no formal work order, but rather a punch list of items for repairs to Devon's platform. The contract required that the parties provide a vessel per se., because only a vessel working alongside the platform could provide a suitable place to perform the work.

REASONS FOR DENYING THE PETITION

The decisions below applied the proper standard for determining whether a contract is maritime or non-maritime. The two-step *Davis & Sons* analysis is designed to determine the nature of the MSA and subsequent work order read together, focusing on the overall character of the contract, rather than on discreet factors of the place of the contract's formation or performance. *Davis* and the Fifth Circuit's decision in this case are consistent with the mandate of *Kossick* and *Kirby*.

1. The Fifth Circuit correctly applied the proper standard in determining whether the contract is maritime or not.

The sole contention made by the Petitioners is that the Fifth Circuit in its decision in determining whether the Devon/Magnolia contract is maritime or not, applied a different standard than the one set forth in this Court's decisions in *Kossich* and *Kirby*. In reading the Fifth Circuit's decision in this case and in *Davis*, it is clear that the standard applied by the court is the exact standard originally set forth by this Court in *Kossick* and reaffirmed in *Kirby* that in determining whether a contract is maritime or non-maritime depends on the nature and character of the contract and not on its place of execution or performance.

The boundaries of admiralty jurisdiction over contracts as opposed to torts being conceptual rather than spatial, have always been difficult to draw. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). This is

particularly true for contracts involving the offshore oil and gas industry, where the particular nature of the terrain and production equipment required to perform the services, coupled with Master Service Agreements which are inchoate, but contain terms which are to be incorporated into agreements for actual services contemplated thereunder, blur the lines between sea and land. *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, 314, 317 (5th Cir. 1990). These latter agreements are periodic work orders calling for the performance of specific services, but must be read together with the MSA when determining whether the true nature and character of the contract is maritime or non-maritime.

In some circumstances historical jurisprudence provides a clear enough answer as to what is or is not maritime. *Kossick v. United Fruit Co.*, 365 U.S. at 735. However, in those instances where the answer is not readily clear, further factual analysis is required to determine the nature and overall character of the contract and not simply its place of execution or performance. *Davis* involved a blanket contract for labor and general contracting services for both onshore and offshore facilities. The separate work order in Davis required a work crew to perform offshore services from aboard a vessel that could function as a mobile platform. To assist with the second step in the analysis of whether an offshore oil and gas industry blanket contract and work orders, read together, constitute a maritime contract, the Fifth Circuit in *Davis* developed a six-factor test:

(1) what does the specific work order in effect at the time of injury provide?

(2) what work did the crew assigned under the work order actually do?

(3) was the crew assigned to work aboard a vessel in navigable waters?

(4) to what extent did the work being done relate to the mission of that vessel?

(5) what was the principal work of the injured worker? and

(6) what work was the injured worker actually doing at the time of injury?

Davis & Sons v. Gulf Oil Corp., 919 F.2d at 316.

Since this court's decision in *Kirby*, the Fifth Circuit in *Hoda v. Rowen Companies, Inc.* 419 F.3d 379 (5th Cir. 2005), and in this case was presented with analogous situations to *Davis* where the work performed pursuant to the blanket contract and subsequent work order was inextricably intertwined with maritime activities and transactions.

In deciding *Kirby*, this court recognized that developments in transportation technology likewise had blurred what had previously been a bright line separating shore from sea, and required application of the two-step *Kossick* methodology to determine the subject matter of the entire contract not simply on the place of execution. In reaching this conclusion, this Court did not create a new standard for evaluating contracts, but simply reaffirmed the standard established with

Kossich and as applied in *Davis*. The two-step analysis as set forth in *Davis* is directly derived from this Court's mandate in *Kossick* and *N. Pac. SS. Co. v. Hall Bros. Marine Ry. & Shipbuilding Corp.*, 249 U.S. 119 (1919). Fifth Circuit's decisions involving offshore oil and gas service contracts since *Davis* including this case adhere to that legal standard.[2]

Prior to the Fifth Circuit's *per curiam* decision, Petitioners submitted a copy of this Court's decision in *Kirby* as a supplement to their original brief arguing that this Court's decision in *Kirby* somehow overruled *Davis* or established a new standard for determining the nature and character of a contract. Petitioners argue that the Fifth Circuit's failure to cite *Kirby* in its decision, somehow suggests that the Fifth Circuit believes that *Kirby* is not intended for general application. Respondent suggests that the Fifth Circuit's failure to cite *Kirby* is a recognition that *Kirby* did not overrule the prior jurisprudence and that the two-step *Davis* test reading the MSA and work order together to determine if the subject matter deals with maritime activities or commerce is therefore consistent with the legal standard reaffirmed in *Kirby*.

---

2. *Campbell v. Soniat Offshore Drilling, Inc.*, 979F.2d 1115 (5th Cir. 1992); *Demette v. Falcon Drilling Co., Inc.*, 280 F3d 492 (5th Cir. 1992); *Diamond Offshore Co. vs. A&B Builders, Inc.*, 302 F3d 351 (5th Cir. 2002); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474 (5th Cir. 1993); *Hoda v. Rowan Cos., Inc.*, 419 F3d 379 (5th Cir. 2005); *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); *Smith v. Penrod Drilling Corp.*, 960 F2d 456 (5th Cir. 1992); *Thibodaux v. Vamos*, 487 F.3d 288 (5th Cir. 2007).

The blanket contract (MSA) between Devon and Magnolia contemplates the use of vessels, and requires Magnolia maintain marine insurance coverages. It contains requirements that Magnolia comply with safety regulations of the United States Coast Guard and includes provisions for wreck removal above or below the surface of the water. Most importantly the MSA includes a choice of law clause calling for the application of the general maritime law.

The work outlined on the punch list required that Thomas and other Magnolia employees work aboard a vessel over navigable waters. Thomas was involved in cargo operations aboard the vessel and the vessel served as a work platform in execution of the items on the punch list. Reading the Devon/Magnolia MSA and punch list together, it is abundantly clear that the contract subject matter covers maritime activities and transactions.

II. The Second and Ninth Circuit's Reevaluation of their Prior Jurisprudence in Light of this Court's Decision in *Kirby* does not Constitute a Split among Circuits.

Clearly when presented with those situations where the historical jurisprudence does not provide a ready and discernible solution to the question of whether a contract is maritime or non-maritime, the courts will always have to take the next step in the analysis to determine the true nature and character of the contract. Such was the case in *Kossick* regarding an agreement by a ship owner to assume responsibility for all consequences of improper or inadequate treatment of

a seaman at a public health service hospital in consideration of his foregoing private treatment; in *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991) applying the two-step analysis to agency contracts for marine fuel requirements; *Davis* in addressing service contracts in the offshore oil and gas industry; and most recently in *Kirby* addressing a contract for intermodal transportation of goods.

Petitioners contend that the Second Circuit's decision in *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005) and Ninth Circuit's decision in *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F. 3d 1308 (9th Cir. 2007), addressing contracts of insurance containing maritime and non-maritime elements wherein those Circuits questioned their prior jurisprudence for analyzing mixed contracts after this Court's decision in *Kirby*, somehow constitutes a split in the Circuits is a mischaracterization of the situation. The Second Circuit decision in *Folksamerica* and the Ninth Circuit decision in *Sentry Select Ins. Co.* simply recognize the applicable legal standard already adopted by the Fifth Circuit beginning with *Davis*.

The Second and Ninth Circuits had previously carved out exceptions to the old rule that admiralty jurisdiction was said to be reserved to contracts, claims, and services purely maritime. The Second Circuit derived a "threshold inquiry" wherein prior to inquiring into the subject matter of the contract, the Court first looked into the subject matter of the dispute.[3] The Second Circuit in *Folksamerica* questioned whether its

3. 413 F.3d at 312.

"threshold" test survives the holding in *Kirby* requiring that courts focus entirely on the underlying contract and not the subject matter of the dispute.[4]

Likewise, the Ninth Circuit in *Sentry Select Insurance* questioned its two exceptions regarding mixed contracts. The Ninth Circuit in prior holdings found a basis for exercising maritime jurisdiction over a contract if the non-maritime obligations were merely "incidental", or if the non-maritime obligations are substantial, the court would "sever" the maritime obligations of the contract and assert maritime jurisdiction over the severed portion.[5] Petitioners argue that the Fifth Circuit's *Davis* analysis is somehow a modified "severability" test, but they clearly ignore the Fifth Circuit's Court's mandate in *Davis*, that in order to determine whether a contract is maritime or non-maritime, one must read both the Master Service Agreement and the work orders together to determine the nature and character of the contract and whether the subject matter involves maritime activities or transactions.

---

4. *Id.* at 313.

5. 481 F.3d at 1218.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

ANTHONY J. STAINES
Counsel of Record
STEPHEN E. MATTESKY
STAINES & EPPLING
3500 N. Causeway Blvd., Ste. 820
Metairie, LA 70002
(504) 838-0019

Counsel for Respondents